ANN M. VENEMAN, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE AND ON BEHALF OF THE CALIFORNIA MILK PRODUCERS ADVISORY BOARD, AND FRANK HILARIDES, A CALIFORNIA DAIRY FARMER v. DAN GLICKMAN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.
No. CIV-S-97-0973 DFL PAN.
Filed September 30, 1998.

AMAA – Standing, representational interest – Discovery of mental processes, *Morgan rule* – Enumerated powers, when not improper delegation of – Rule making, when not required – F.O.I.A., when not subject to – Nickel, fiscal control of assessment.

The Secretary of the California Department of Food and Agriculture ("CDFA") brought suit on behalf of the California Milk Producers Advisory Board ("CMAB"), a west coast oriented milk producers organization, alleging that the creation of an intermediary not-for-profit private corporation, Dairy Management, Inc. ("DMI") based in Washington, DC, has greatly diminished their sphere of influence regarding the policies of the National Dairy Promotion and Research Board ("Board"). CMAB, one of 13 geographical regions, asserts that milk producers in regions other than the west coast now unduly influence decisions of the Board. The various programs administered by the Board are sponsored by the United Dairy Industry Association ("UDIA"). UDIA, an Illinois not-for-profit corporation, is a federation of 18 state and regional boards that pay dues to the UDIA. In a secret ballot meeting, the UDIA and the Board jointly created DMI to handle administrative matters common to both the Board and UDIA. The U.S. District Court determined that:
(1) CMAB has representational standing to sue - citing three criteria.
(2) ALJ did not err in denying examination of the mental processes/motives of administrative officers of Board, citing *U.S. v Morgan*.
(3) Formation of DMI did not violate Government Corporation Control Act (31 U.S.C. § 9102) nor exceed the enumerated powers of the Board under 7 C.F.R. § 1150.139.
(4) Board did not improperly delegate its powers and duties to DMI when Board retained power to review and fund DMI.
(5) Board is not required to seek review and comment under A.P.A. (5 U.S.C. § 553).
(6) DMI (a private corporation) is not subject to F.O.I.A. requests.
(7) Petitioner failed to show actionable conflicts of interest by the Board.
(8) Petitioner failed to show that Board exceeded the maximum amount allowed for administrative expenses under 7 C.F.R. § 1150 by creation and delegation to DMI.

United States District Court
Eastern District of California

MEMORANDUM OF OPINION AND ORDER

Plaintiffs Ann M. Veneman, Secretary of the California Department of Food and Agriculture, and Frank Hilarides, a California dairy farmer, bring this action for

judicial review of a decision by a Judicial Officer of the United States Department of Agriculture ("USDA") dismissing their Petition to Modify or Be Exempted From the Provisions of the Dairy Promotion and Research Order ("Petition"). Plaintiffs challenge the legality of an arrangement between the National Dairy Promotion and Research Board and the United Dairy Industry Associates ("UDIA") to create a private not-for-profit corporation, Dairy Management, Inc. ("DMI"), for the purpose of performing administrative, financial, and management functions for both the National Dairy Promotion and Research Board and UDIA. Plaintiffs and defendant Dan Glickman, Secretary of USDA, make cross-motions for summary judgment.

I. FACTUAL BACKGROUND

A. THE PARTIES

Congress authorized the creation of the National Dairy Promotion and Research Board[1] in Title I, subtitle B, of the Dairy and Tobacco Adjustment Act of 1983 ("Act"), Pub. L. 98-180, 97 Stat. 1128, codified at 7 U.S.C. § 4501, *et seq.* The Act provides for the issuance of a dairy products promotion and research order by the Secretary of USDA. 7 U.S.C. § 4503. The Act also requires that the Secretary's order contain certain terms and conditions, for example setting the size and composition of the National Board, establishing the Board's powers and duties, and authorizing the Board to collect an assessment from milk producers. *See* 7 U.S.C. § 4504.

The National Board was formally created on March 28, 1994 by the Dairy Research and Promotion Order ("Order"). 7 C.F.R. Part 1150. The Board has thirty-six members who are milk producers appointed by the Secretary of USDA for the purpose of representing thirteen geographic regions within the United States. 7 C.F.R. 1150.131. Defendant Dan Glickman, the Secretary of USDA, is responsible for the administration of the Board. (Pls.' Fact 4).

The National Board is funded by mandatory assessments on the payments by wholesale purchasers of milk to milk producers. 7 U.S.C. § 4504(g). The total assessment is fifteen cents per hundredweight of milk. *Id.* Milk producers who participate and contribute funds as members of active, qualified state or regional dairy product promotion programs may receive a credit on the assessment of up to

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[1]The cognoscenti refer to the National Dairy Promotion and Research Board as "the NDB" or just "NDB." In a surely bootless effort to avoid undue and confusing use of acronyms in this opinion, the court will generally refer to the National Dairy Promotion and Research Board as the "National Board" or the "Board."

ten cents per hundredweight of milk. *Id.* The ten cents per hundredweight, which is assigned to state and regional programs, is commonly referred to as the "dime," and the five cents reserved for the National Board is called the "nickel."

Plaintiff Ann Veneman brings this suit in her official capacity as the Secretary of the California Department of Food and Agriculture ("CDFA") and on behalf of the California Milk Producers Advisory Board ("CMAB"). CMAB is an unincorporated advisory board representing all California dairy farmers who pay assessments to the National Board.[2] CMAB is an instrumentality of the State operating under the umbrella of the CDFA. (Pls.' Facts 1, 2). Secretary Veneman is responsible for collecting the mandatory assessments payable to the National Board from California dairy farmers and for the administration of CMAB. (Pls.' Fact 1). Frank Hilarides is a California dairy farmer and is CMAB's chairman of the Board. (Pls.' Fact 3). CMAB is a qualified state or regional program under the Act.[3] (Administrative Record ("Rec.") at 1200-01).

Although not a party, the United Dairy Industry Associates ("UDIA") is a central figure in the events that serve as the basis of this litigation. UDIA is an Illinois not-for-profit corporation. (Def.'s Fact 3; Pls.' Fact 7). It is a federation of eighteen state and regional dairy research promotion boards that pay annual dues to UDIA. (Pls.' Facts 8-9). Members also make payments to UDIA–known as "user pays" and "pools"[4]–to pay for their share of various programs sponsored by UDIA. CMAB and qualified state or regional dairy promotion boards in four other states–Oregon, Washington, Wisconsin, and Louisiana–operate independently of UDIA.[5]

B. THE ESTABLISHMENT OF DMI

On March 16, 1994, staff members of the National Board and UDIA orally presented the concept of consolidating the staffs of the two organizations at an executive session of the National Board. (Pls.' Fact 74). The proposed merger of

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[2]CMAB was established by Order of the Secretary of the CDFA pursuant to the California Marketing Act of 1937, codified at California Food & Agriculture Code § 58601, *et seq*.

[3]The requirements necessary to become a qualified state or regional dairy regional programs are set forth in 7 C.F.R. § 1150.153.

[4]A "user pay" represents the state or region's share of the cost of a particular program in which it elects to participate. (Pls.' Fact 11). A "user pool" represents the ideal or required amount of funding necessary for a particular program: when it is in their interest to do so, participants may contribute more than their proportionate share. (Pls.' Fact 12).

[5]California, Oregon, Washington and Wisconsin have formed COWW, a regional federation for these four states that is analogous to UDIA.

the National Board and UDIA staffs allegedly generated apprehension in some quarters that the consolidation would work to the disadvantage of West Coast milk producers. (*See* Pls.' Fact 79). In a vote by secret ballot, the National Board adopted the staff recommendation by a vote of twenty-seven to seven. (Pls.' Facts 75-76). The Board and UDIA publicly announced the proposed creation of DMI on March 17, 1994.

The two organizations entered into a formal agreement to create DMI on April 27, 1994. Under the terms of the agreement, DMI has a number of enumerated purposes:

> (1) To implement joint programs and projects between NDB and UDIA;
> (2) To provide funding, management, staff and other resources, and to plan, develop, and implement programs authorized under federal and state dairy check-off programs;
> (3) To provide resources for program evaluation and market research to the NDB and UDIA;
> (4) To manage benefit programs for employees of the Corporation, the parties, and related organizations;
> (5) To implement specific NDB- and UDIA-funded programs; and
> (6) To carry out the administrative, financial and management functions of NDB and UDIA and the Corporation.

(Rec. at 1251A).

DMI was formed as a not-for profit corporation in Washington, D.C. on May 31, 1994. (Pls.' Fact 14). Silvio Capponi, Jr., the Acting Director of the Dairy Division, Agriculture Marketing Service, USDA, approved the agreement on June 8, 1994, one week after the incorporation of DMI. (Pls.' Fact 82). A budget for DMI had not been prepared at that time but was subsequently approved by the USDA.[6] (Pls.' Fact 83).

The board of DMI consists of twenty members, ten representing the interests of the National Board, and ten representing the interests of UDIA. (Rec. at 65). The duties of the DMI board are as follows:

> In addition to those duties required by law, its specific duties shall include, without limitation:

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[6]The National Board approved a budget for DMI in November 1994, and the USDA approved this budget in December 30, 1994. (Pls.' Fact 93). USDA approved subsequent amendments to the budget made by the National Board in January 1995 and May 1995 on June 30, 1995. (*Id.*).

(1) Implementation of a joint planning process;
(2) Development and, following approval by the parties, implementation of an Annual Business Plan and Annual Budget for the Corporation;
(3) Management of all funds and assets of the Corporation, and development of all budgets of the Corporation;
(4) Development and approval of joint personnel policies and compensation and benefit programs for employees of the Corporation;
(5) Development and approval of by-laws and operating rules for the Corporation;
(6) Selection, hiring, firing, and overall management of the officers and employees of the Corporation, which authority may be delegated to appropriate corporate officers.

(Rec. at 1252-53). The National Board representatives on the DMI board are selected by the National Board from among its 36 members and are subject to later removal by the Board.[7] (Pls.' Fact 86; Rec. at 1252). Significant overlap is possible; three of the current directors serve on the boards of the National Board, UDIA, and DMI. (Rec. at 68).

The National Board and DMI entered into an agreement for services to be provided by DMI to the National Board on December 30, 1994.[8] (Pls.' Fact 87). The agreement has resulted in several changes in the administration of the National Board's duties although the significance and extent of these changes is disputed by the parties. First, as intended, DMI took over many of the functions previously performed by the National Board staff; however, defendant disputes plaintiffs' claim that DMI performs all administrative functions formerly performed by the Board's staff. (*See* Pls.' Fact 107). Tom Gallagher, the CEO of DMI, repots to the DMI board, which in turn is accountable to the National Board and UDIA. (*See* Pls.' Facts 110-111). Gallagher is responsible for establishing DMI staff salaries. (Pls.' Facts 148, 150). DMI is authorized to administer the funds budgeted under the December 30, 1994 agreement and to write checks on the National Board's checking account. (Pls.' Facts 125-127). DMI is responsible for maintaining the National Board's books and records, as well as coordinating meetings of the National Board, DMI, UDIA, and their committees. (Pls.' Facts 132-133). DMI coordinates all national advertising. (Pls.' Fact 134). Almost all of the National Board's contracts are now entered into and administered through DMI. (Pls.' Facts 139-140).

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[7]The Secretary of USDA has no power to remove directors from the DMI board other than by removing a National Board representative on the DMI board from the National Board. (Rec. at 945).

[8]Aggie J. Thompson, Acting Director of the Dairy Division, Agriculture Marketing Service, USDA, approved the agreement and made it effective for 1995. (Pls.' Fact 87).

Second, the creation of DMI reduced the direct oversight of the Secretary of USDA in some measure. Prior to the formation of DMI, all National Board contracts received approval from USDA. While all National Board contracts are still approved by USDA, DMI contracts do not receive formal approval by USDA. (Pls.' Facts 135-137). Further, the Secretary of USDA has no authority to hire or fire DMI staff.[9] (Pls.' Fact 147-148). (Pls.' Fact 141). On the other hand, USDA attends all DMI board meetings and activities, reviews all of DMI's contracts even if it does not formally approve them,[10] and must approve all expenditures of the nickel. The USDA planned to perform an audit of DMI in calendar year 1996. (Rec. at 1192). More fundamentally, the USDA must approve the National Board's annual budget on which DMI depends for its existence.

Third, after the agreement, the National Board's supervision of contracts and projects is accomplished primarily at the Board level and through joint subcommittees with UDIA, rather than by its own staff and committees. (*See* Pls.' Facts 142-144). Plaintiffs assert that the creation of DMI has curtailed activities of the National Board and its committees, and that the statutory requirement of geographic diversity in committee representation is no longer followed. (*See* Pls.' Facts 120-124, 143-44). The National Board now meets four times a year, with each meeting lasting two to four hours, which is a reduction from six or seven meetings of six hours each held in 1994. (Pls.' Fact 112-115). The Board is only required to meet once a year. 7 C.F.R. § 1150.140(a). According to defendant, despite these changes, the National Board maintains significant oversight and control over DMI and has not abdicated its responsibilities. DMI cannot approve programs or appropriate funds on its own. (Rec. at 906). Programs that are funded by the nickel must be approved both by the National Board and the USDA. (Rec. at 940). Further, UDIA has no access to the funds from the nickel except where it participates in the programs approved by the National Board. (Rec. at 977). The National Board and the Secretary may unilaterally dissolve the corporation on one year's notice or trigger a dissolution by declining to approve the budget prepared by DMI staff for the National Board or refusing to contribute required funds. (*See* Rec. at 1256-1258).

Fourth, the arrangement resulted in certain possible benefits to UDIA. Because

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[9]DMI also asserts that as a non-governmental entity it is not subject to the Freedom of Information Act ("FOIA"). Gallagher, the CEO of DMI, similarly contends that he is not a government employee or official. (Pls.' Fact 149).

[10]USDA has objected to DMI contracts in the past. (Rec. at 1188). Although no precise legal basis is identified, Richard McKee, Director of the Dairy Division of USDA, testified that USDA can and would require DMI to modify any contract violating the Act or the Order. (Rec. at 1195).

UDIA appoints half of the DMI board and because the National Board relies on DMI staff to advise it and to prepare the National Board's budget, it is possible that UDIA has some enhanced ability to exert influence, albeit indirectly, over the National Board including its budget. Further, because the cost of collecting dues and monies are considered core costs,[11] which are shared equally between DMI and the National Board, the National Board technically pays for half of UDIA's collection costs just as UDIA pays for half of the National Board's collection costs. (Pls.' Facts 170-171). Whether this is a net gain for UDIA or the National Board is unclear although it is likely that both have benefitted from resulting economies. The most significant cost saving to UDIA has been in the area of staff and in the costs of developing promotion programs.[12] (Pls.' Facts 157-161). Indeed, UDIA members recently received a refund from the organization. (Pls.' Fact 162). Finally, UDIA's influence within DMI has allegedly increased its national influence in the promotion program planning and distribution process, as well as in the marketplace. (Pls.' Facts 155-156). On the other hand, despite the alleged increase in UDIA's power and prestige, plaintiffs are notably unable to point to any particular decision by the National Board, or DMI for that matter, that discriminates against California producers.

C. THE ADMINISTRATIVE PROCEEDINGS

On April 5, 1994, CMAB and Henry J. Voss, the Secretary of the CDFA at that time, filed an Administrative Petition to challenge the legality of the creation of DMI. Plaintiffs filed the Petition pursuant to 7 U.S.C. § 4509(a).[13] Petitioners later

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[11]"Core costs" are defined as

> the basic cost of salaries and benefits for employees of [DMI] and general administrative costs for the operation of [DMI], and shall also include the costs of planning activities. Core costs shall not include NDB/USDA direct compliance costs, including without limitation, costs charged by USDA for oversight of NDB.

(Rec. at 1254). "Program" costs, on the other hand, are

> the costs attributable to expenditures, not including core costs, of implementing the program contained in the Annual Business Plan and the Annual Budget.

(*Id.*).

[12]UDIA no longer maintains its own staff separate frm that of DMI. (Pls.' Fact 163).

[13]Section 4509(a) creates a petition process as follows:

> Any person subject to any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed

added Frank Hilarides, a California dairy farmer, as an individual petitioner, and substituted Ann Veneman for Voss, when Veneman became Secretary of the CDFA. During the administrative proceedings, plaintiffs were not permitted to examine officials from the USDA regarding the approval of the agreements that created DMI. (*See* Rec. at 795-96, 1166-1169, 1174-1177).

USDA Administrative Law Judge Victor W. Palmer dismissed the Petition on March 20, 1996. Judge Palmer found that plaintiffs possessed standing to challenge the agency action under 7 U.S.C. § 4509(a), but found for defendant on all of plaintiffs' claims. Judicial Officer ("JO") William G. Jenson affirmed Judge Palmer's decision, as modified, on May 6, 1997. The JO reversed the ALJ's finding on the standing question with respect to CMAB and Secretary Veneman. Plaintiffs filed this action seeking judicial review of the administrative proceedings on May 23, 1997.

II. STANDING

Plaintiffs invoke federal jurisdiction under 7 U.S.C. § 4509(b).[14] (Compl. ¶ 7). Under § 4509(b), the court has jurisdiction to review an administrative ruling made under 7 U.S.C. § 4509(a). The JO found that CMAB and the Secretary of CDFA have no standing to challenge the creation of DMI under § 4509(a) because they are not persons "subject to" the Order.[15] (Rec. at 723). However, because Hilarides is an individual dairy farmer who pays assessments to the National Board, he is certainly subject to the Order and a proper petitioner under § 4509(a). Moreover, because Secretary Veneman and CMAB jointly represent California dairy farmers, all of whom are subject to the Order, Secretary Veneman and CMAB have

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in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

[14]Section 4509(b) provides in relevant part:

The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling.

[15]The JO found that such entities are not "subject to" the order because "no provision in the Dairy Order, and Petitioners have cited none, . . . governs, regulates, controls, obligates, or binds the Secretary of CDFA." (Rec. at 724).

representational standing.[16] An organization may have representational standing to sue on behalf of its members when three requirements are met: 1) at least one member of the organization has standing to sue; 2) the interests which the organization seeks to protect are germane to its purpose; and 3) neither the claim asserted nor the relief requested require participation in the suit by the organization's members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1352 n.10 (9th Cir. 1994). All of these factors are met by CMAB in this litigation. Accordingly, CMAB and Secretary Veneman, acting on behalf of CMAB, have representational standing.

Furthermore, CMAB and Secretary Veneman have standing in their own capacity. State and regional programs such as CMAB are within the definition of "person" in 7 C.F.R. § 1150.105.[17] CMAB is also a qualified regional program under the Order. As a regional program, the Order enables CMAB to receive its share of the "dime" and to nominate representatives to serve on the National Board. 7 C.F.R. §§ 1150.152, 1150.153, 1150.133, 1150.108. The Order also provides financial incentives, by way of the nickel, for the formation of joint promotional programs between CMAB and the National Board, and establishes requirements for coordination of joint promotional activities. 7 C.F.R. §§ 1150.152(c), 1150.140(i).

Section 4509(a) is broadly drafted to provide review of "any order," "any provision of such order," or "any obligation imposed in connection therewith." Any "person" may sue who is "subject to an order." The statute does not require that the person "subject to any order" and who seeks review of "any obligation" necessarily be subject to that obligation. The agreement creating DMI is an obligation imposed in connection with the Order. CMAB and Secretary Veneman are subject to the Order; they collect assessments and participate in programs under the Order. It follows that as persons subject to the Order they may seek review of the agreement creating DMI.

For these reasons, the JO's finding that CMAB and Secretary Veneman lack standing appears clearly erroneous. CMAB and Secretary Veneman are proper petitioners, in their own behalf and on behalf of CMAB's membership, with standing to proceed under § 4509(a).[18]

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[16]Veneman is required by California law to bring the lawsuit on behalf of CMAB, because CMAB is only an advisory board and is not authorized to bring suit on its own behalf. *See* Cal. Food & Agric. §§ 58713, 58845, 58846, 614171 [so in original], 61893.

[17]"Person" is defined as "any individual, group of individuals, partnership, corporation, association, cooperative or other entity." 7 C.F.R. § 1150.105.

[18]Article III standing requirements are met. *See Lujan v. Defenders of Wildlife*, 501 U.S. 555, 561-62 (1992). Plaintiffs complain that the assessments on California diary [so in original] farmers are being spent in violation of the Act and the Order. They want their assessments returned or halted so long as the DMI agreement is in effect. This constitutes injury that is fairly traceable to the conduct of

III.

Plaintiffs seek review of the agency decision on plaintiffs' petition challenging the creation of the DMI. Under 5 U.S.C. § 706(2)(A) the decision of the Secretary of USDA should not be disturbed unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[19] The court is limited in its review to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 305 (9th Cir. 1980). In reviewing factual findings of the Judicial Officer, the court must determine whether the findings are supported by substantial evidence. 5 U.S.C. § 706(2)(D).

A. DEVELOPMENT OF THE RECORD

Plaintiffs complain that the ALJ improperly precluded examination of government officials with respect to the decision to form DMI. In *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court held that administrative officers may not be examined as to their mental processes in order to protect the integrity of the administrative process. *See id*. Questions going to the mental processes of an administrator are improper "absent exceptional circumstances," and "[o]nly where there is a clear showing of misconduct or wrongdoing." *Franklin Savings Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991); *see also Singer Sewing Machine Co. v. National Labor Relations Bd.*, 329 F.2d 200, 208 (4th Cir. 1964).

In the present case there is no evidence of misconduct justifying an exception to the Morgan rule. Furthermore, plaintiffs' reliance on *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577 (E.D.N.Y. 1979), and *United States v. Hooker Chemicals & Plastics Corp.*, 123 F.R.D. 3 (W.D.N.Y. 1988), is misplaced.[20] The

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the defendant and that may be redressed if the court grants relief. Moreover, plaintiffs contend that the creation of DMI gives UDIA members a competitive advantage in procuring federal support for programs that may have greater benefit for UDIA members than for CMAB members.

[19]This is the same as the "not in accordance with law" standard of review set forth in 7 U.S.C. § 4509.

[20]The *Franklin Nat'l Bank* court, considering the official information privilege with respect to government documents, expressly distinguished the *Morgan* line of cases, stating that the mental processes privilege is "a related, though still distinct principle." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 581. In *Hooker Chemicals & Plastics*, 123 F.R.D. 3, the court held that the mental process privilege and the deliberative process privilege are not coextensive where the issue is judicial review of administrative action. *See id.* at 11. Because the administrative process is at issue in this

JO did not err in affirming the ALJ's decision to restrict examination of agency officials on *Morgan*. Defendant's motion for summary judgment is **GRANTED**, and plaintiffs' cross-motion for summary judgement is **DENIED**, as to whether the ALJ improperly restricted examination under *Morgan*.

B. AUTHORITY TO CREATE DMI

Plaintiffs contend that the National Board acted without statutory authority when it created DMI. Plaintiffs advance two lines of argument to attack the validity of the National Board's decision: first, that Congress did not confer power on the National Board to form DMI, and second, that the National Board's creation of DMI violated the Government Corporations Control Act.

1. Statutory Authority

An initial question is whether the USDA's interpretation of the Act and the Order should be accorded deference. Courts generally accord great deference to an agency's interpretation of the statutory and regulatory provisions that it is responsible for administering, and the general rule would appear applicable here.[21] *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1311 (9th Cir. 1997). The plaintiffs' arguments to the contrary are unpersuasive. The agency's interpretation is clear from administrative practice, in that the Secretary of USDA formally approved the creation of DMI. This is not a case where the court is asked to defer to "an agency's convenient litigating position" where "the agency itself has articulated no position on the question. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Nor does the present case raise the same concerns expressed in the concurring opinion in *California Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 937 F.2d 465, 466 (9th Cir. 1991) (Farris, J.), where the statutory and regulatory provisions at issue defined the jurisdictional limits of the agency's authority.

Accordingly, defendant's interpretation of the Act and Order are entitled to

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case, the mental process privilege is squarely implicated.

[21]Under *Chevron*, the first stop in reviewing an agency's interpretation of a statute is to determine whether congressional intent is clear. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). An agency interpretation must be rejected where "contrary to clear congressional intent." *Id.* at 843 n.9. *Dombeck*, 131 F.3d at 1311. If the statute is silent or ambiguous, the court must consider whether the agency construction is permissible. *Chevron*, 467 U.S. at 843. Congress may expressly delegate authority to an agency to enact regulations formulating policy, or it may implicitly delegate authority on a particular question. *Id.* at 843-44. In the latter case, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

deference. Because the Act and Order are silent as to the means by which the National Board may provide for performance of its administrative functions, plaintiffs' challenge can be sustained only if the Secretary's interpretation is an impermissible construction of the relevant provisions.

Plaintiffs' argument that the creation of DMI exceeded the Secretary's statutory authority is grounded in 7 U.S.C. § 4504(c), which provides, in relevant part, that

> The order shall define the powers and duties of the Board that shall include only the powers enumerated in this section. These shall include, in addition to the powers set forth elsewhere in this section, the powers to (1) receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals, (2) administer the order in accordance with its terms and provisions, (3) make rules and regulations to effectuate the terms and provisions of the order, (4) receive, investigate, and report to the Secretary complaints of violations of the order, and (5) recommend to the Secretary amendments to the order.

7 U.S.C. § 4504(c). Plaintiffs argue that because the statute does not expressly authorize the National Board to create a private corporation for the reasons that DMI was created, the National Board acted outside the scope of authority conferred by § 4504.

Defendant contends that the powers conferred by § 4504 are not so limited. Section 4504(c) provides that the list of powers in that subsection are "in addition to the powers set forth elsewhere in this section." The National Board has authority under § 4504(f) to enter into contracts with respect to the "development and conduct of the activities authorized under the order as specified in subsection (a)."[22] 7 U.S.C. § 4504(f). Section 4505(a) in turn confers broad authority on the Secretary in promulgating the order to "provide for the establishment and

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[22] 7 U.S.C. § 4504(a) provides:

> The order shall provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes. Any such plan or project shall be directed toward the sale and marketing or use of dairy products to the end that the marketing and use of dairy products may be encouraged, expanded, improved, or made more acceptable. No such advertising or sales promotion program shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes."[23] Defendant argues that this authority was implicitly conferred on the National Board by § 4504(c) and 7 C.F.R. Part 1150.

The powers of the National Board as established by the Secretary are codified at 7 C.F.R. § 1150.139. In particular, the Board is authorized "[t]o receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals," and "[t]o administer the provisions of this subpart in accordance with its terms and provisions," 7 C.F.R. §§ 150.139(a), (b). The power to enter into contracts is provided by 7 C.F.R. § 1150.140(i):[24]

> With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152.

The National Board's authority to employ and define the duties of an administrative staff is established in 7 C.F.R. § 1150.140(c).[25] Taken together these statutory and regulatory provisions give wide latitude to the Secretary and the National Board to engage in projects and promotions for the benefit of the milk industry. The

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[23]Section 4504 also permits the Secretary to include in the promulgating order any "terms and conditions, not inconsistent with the provisions of this subchapter, as necessary to effectuate the provisions of the order." 7 U.S.C. § 4504(1).

[24]Section 1150.140(i) further provides that "[a]ny such contract or agreement shall provide that:

> (1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;
>
> (2) Any such plan or project shall become effective upon approval of the Secretary; and
>
> (3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party.

[25]7 C.F.R. § 1150.140(c) authorizes the National Board "[t]o appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each."

Secretary has broad authority in drafting the Order and has delegated expansive administrative authority to the National Board, which acts under the supervision and on behalf of the Secretary.

In order to reach the result urged by plaintiffs, the court must find that the exercise of any power not explicitly provided for by the Act is prohibited. The language of the Act does not compel such a conclusion. The language of 7 U.S.C. § 4504 is sufficiently broad to confer power on the National Board to create and maintain DMI. It is readily apparent from the Act that Congress implicitly left the precise manner of administering the Order to the National Board. The creation of DMI falls within this area of discretionary authority. Particularly in light of the deference due to the Secretary's interpretation of the Order and the statutory framework, the court finds that the creation of DMI was within the National Board's statutory authority.

In a related argument, plaintiffs contend that the power of the National Board to enter into contracts is limited to contracts directly connected with plans and projects where accompanied by a budget. However, the power to contract is not so narrowly defined in the Act: The Board "may enter into agreements for the development and conduct of the activities authorized under the order as specified in subsection (a)." 7 U.S.C. § 4504(f). Contracts to receive administrative support for development and implementation of programs are fairly categorized as agreements within the language of 7 U.S.C. §§ 4504(a) & (f).[26]

Because defendant's interpretation of the Act and Order are not contrary to the clear congressional intent underlying the Act, the court does not disturb the JO's finding that the National Board acted within its statutory power in forming DMI to assist in implementing the Board's statutory duties.

2. Government Corporation Control Act

Plaintiffs also assert that the creation of DMI violates the Government Corporation Control Act ("GCCA"): "An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. The GCCA restricts "the

[26]Plaintiffs advance two further arguments. Noting similarities between DMI and the boards created by two other legislative acts, plaintiffs assert that Congress could have expressly conferred authority to create DMI, but chose not to do so in § 4504. This argument is not convincing, especially because the Beef Promotion and Research Act of 1985 and the Soybean Promotion, Research, and Consumer Information Act of 1990 were adopted after the Dairy and Tobacco Adjustment Act of 1983. Plaintiffs also assert that the DMI board does not comply with the geographic representation requirements of § 4504. But the Order and Act require geographic diversity only for the National Board, not for its support staff.

creation of all Government-controlled policy-implementing corporations." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 396, 115 S. Ct. 961, 973 (1995) (emphasis in original). The critical question in determining the applicability of the GCCA is whether the corporation is truly private or if it acts as a government agency. "Agency" is defined as "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101.

In determining whether a corporation acts as an agency, a number of factors may be considered: whether it was created to further federal government goals, whether the federal government possesses permanent authority to appoint a majority of the directors, whether the government owns shares in the corporation, whether the government subsidizes the losses of the corporation, whether the employees of the corporation are employed by the federal government, and whether the government-appointed directors exert control as policymakers or in some other aspect such as creditors. *See id.* at 397-99, 115 S. Ct. 973-74; *see also Varicon Int'l v. Office of Personnel Management*, 934 F. Supp. 440, 447 (D.D.C. 1996).

DMI is a private corporation whose principal function is to provide staff and administrative support to the National Board and UDIA. Although the National Board and UDIA partly created DMI to perform the National Board's administrative, financial, and management functions, DMI was equally intended to perform the same services for UDIA, a private entity. The National Board has authority to appoint only ten of the twenty directors, not a majority of the DMI board, and the National Board owns no stock in DMI. DMI employees are not federal employees. The National Board retains all of its statutory policymaking responsibilities such that the DMI board is not empowered to act independently of the National Board or UDIA as to matters of policy.

Other facts might indicate that DMI should be classified as a federal agency. First, the possibility of federal subsidization of DMI losses exists because an unanticipated shortfall in revenue could conceivably cause DMI to enter a period of deficit spending, resulting in subsidization by the National Board of DMI's losses. (*See* Rec. at 1272). Second, National Board representatives on the DMI board do not represent the National Board merely as a creditor of DMI; the representatives possess limited but significant policymaking power. (*See* Rec. at 1252-1253). Finally, the National Board and the Secretary retain the right to unilaterally cause DMI's dissolution on one year's notice. (Rec. at 1257-1258). DMI's Annual Plan and Annual Budget must be approved by the Secretary of USDA before it becomes effective. (Rec. at 1471). The National Board's failure to approve the Annual Plan or the Annual Budget for DMI is also grounds for dissolution. (*See* Rec. at 1256).

Although not free from doubt, on balance these factors suggest that DMI does not constitute or act as a government agency. Rather, it is more like a government contractor, providing staff support to the National Board under an annual contract. As the JO observed, DMI's activities are supervised by the National Board and the

Secretary of USDA, and the corporation "performs tasks that could be performed by an outside contractor for UDIA and NDB." (Rec. at 704). The scope of DMI's authority and responsibilities with respect to National Board-funded activities is limited by contract, and the National Board maintains supervision and final policy-making authority over DMI.

For the reasons stated above, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether the National Board possessed authority to create DMI.

C. IMPROPER DELEGATION

As conceded by the plaintiffs, the nondelegation doctrine has lost much of its strength since the 1930s. The doctrine, based on the principle of separation of powers, now requires only that the delegation contain an "intelligible principle" or sufficient minimal standards permitting a determination "'whether the will of Congress has been obeyed.'" *Mistretta v. United States*, 488 U.S. 361, 379 (1989), *quoting Yakus v. United States*, 321 U.S. 414, 426 (1944). The Ninth Circuit recently observed that "no modern case appears to have struck down a delegation." *Wileman Bros. & Elliot, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990).

The delegation of duties from the National Board to DMI does not violate the minimum requirements of the nondelegation doctrine. In the first place, the terms of the delegation are established and bounded by the terms of a detailed agreement between DMI and the National Board. (*See* Rec. at 1222-1278). This agreement satisfies the requirement that the delegation be guided by an "intelligible principle." Second, plaintiffs fail to establish that the National Board has delegated any lawmaking power to DMI. Rather, the nondelegation doctrine is inapplicable in this context because the National Board has retained sufficient control and supervision over DMI with respect to program planning and financial matters.[27] *See United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Federal agencies properly may employ a private corporation in an administrative capacity for the purpose of executing laws. *Crain v. First Nat'l Bank of Oregon,*

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[27]In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), the court upheld the delegation of duties under the Beef Promotion Act to the Cattlemen's Board, a board of industry members appointed by the Secretary of USDA in a manner similar to the National Board, and the Operating Committee, consisting of ten members elected by the Cattlemen's Board and ten members representing qualified State beef councils. The key inquiry was whether Congress had unlawfully delegated lawmaking ability to the agency. *Id.*, *citing Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). The court found that the Beef Act did not entrust legislative authority to the beef industry because "the Act and the Order render the actions of the Cattlemen's Board subject to the Secretary's pervasive surveillance and authority." *Frame*, 885 F.2d at 1128-29.

Portland, 324 F.2d 532, 537 (9th Cir. 1963), *citing Berman v. Parker*, 348 U.S. 26 (1954).

Plaintiffs also assert that the National Board's delegation of duties to DMI is an improper delegation of duties to an interested private party, relying on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *Pistachio Group of the Ass'n of Food Indus.*, 671 F. Supp. 31 (Ct. Int'l Trade 1987). In particular, plaintiffs contend that the Board has "abdicated" its responsibility to regulate promotion and marketing of milk products to DMI, in turn controlled by UDIA, and that the Board's actions have forced plaintiffs "to support, and participate in, UDIA sponsored or dominated programs despite their longstanding unwillingness to do so." (Pls.' Opp'n and Counter Mot. at 43:17-19, 44:2-5).

In *Carter Coal*, the Court invalidated a provision of the Bituminous Coal Conservation Act of 1935 providing that the maximum daily and weekly hours for all producers of bituminous coal could be set by contract, where the contract was agreed to by producers representing two-thirds of the annual tonnage of production from the prior year. The Court found that this delegation conferred on the majority of producers "the power to regulate the affairs of an unwilling minority" in violation of the due process clause of the Fifth Amendment. *Carter Coal*, 298 U.S. at 311.

Similarly, in *Pistachio Group* the court invalidated a federal regulation using exchange rate set by the Federal Reserve Bank of New York, a private corporation, for the purpose of administering the antidumping laws. The court held that "[d]elegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on grounds of conflict of interest." *Pistachio Group*, 671 F. Supp. at 35. The agency had improperly delegated all of its authority to determine the exchange rate to an outside party over which it had no power of review. *Id.* at 35-36. However, the court noted that delegation may be proper where ultimately subject to some form of scrutiny. *Id.* at 36.

Plaintiffs fail to establish that the National Board has abdicated any of its responsibilities to DMI.[28] The administrative record contains compelling evidence

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[28]The evidence most strongly supporting plaintiffs' view is testimony by Tony Souza, a member of the National Board:

> Well, a lot of things have changed. The committee structure a lot of times that develop programs with staff input, and this is where a lot of things were determined, and then it would be up to the board level for approval. Now a lot of things come in, the committee's all pre-determined.
>
> A lot of the board members are concerned that we're like a rubberstamp board and not involved so much with the planning. Hopefully maybe this will change.

(Rec. at 1139). Souza further testified that evaluation of staff progress is no longer done on the committee level. (Rec. at 1155-1156). This evidence is insufficient to show abdication by the National

that the National Board and the Secretary maintain oversight and control over DMI. The Annual Business Plan and Annual Budget drafted by the DMI Board for the upcoming year are ineffective without approval by the National Board and the Secretary of USDA. (Rec. at 14/1). The National Board maintains final responsibility for collecting assessments, financial management, and program approval. (Rec. at 1267, 1270). The Board may modify or reject any program plans and materials without limitation. (Rec. at 1276). DMI must regularly report its activities to the National Board. (Rec. at 1268-1269).

In short, the National Board maintains significant power of review over the implementation of its statutory duties, and has not abdicated its duties in the manner found improper in *Carter Coal* and *Pistachio Group*. UDIA is a potentially interested private party and may reap certain benefits from the arrangement between the National Board and DMI. But without evidence that the National Board has yielded its overall supervisory authority, UDIA's participation in DMI does not vitiate the delegation of certain duties by the National Board to DMI. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

Defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether the creation of DMI effected an improper delegation.

D. NOTICE AND COMMENT

Plaintiffs contend that the agreements between the National Board and UDIA establishing DMI are invalid because they were not adopted pursuant to the notice and comment rulemaking procedures provided by the Administrative Procedure Act in 5 U.S.C. § 553.[29] The notice and comment process is required whenever an agency proposes to formulate, amend, or repeal a rule.[30] See *id.*; 5 U.S.C. § 551(5). Defendant contends that even if the establishment of DMI constitutes a rule, two exceptions to the notice and comment requirement apply.

A threshold question is whether the creation of DMI constitutes a rule under

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Board of any of its lawmaking duties.

[29]It is undisputed that defendant did not follow notice and comment procedures.

[30]Plaintiffs also contend that the changes are amendments to the Order, and that the Order requires notice and comment for all such amendments. But the fact remains that the Order has not been amended.

§ 551(4).[31] Section 551(4) defines a "rule" as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Read literally, the definition of "rule" is broad, including "virtually every statement an agency can make." *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346, 1356 (E.D. La. 1988), *quoting Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *see also Batterson v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980).

The JO held that the agreement between the National Board and UDIA to create DMI did not trigger the notice and comment provisions of the APA:

> DMI is a private, not-for-profit corporation formed under the laws of the District of Columbia. It is not an agency as that term is defined for the purposes of the Administrative Procedure Act (5 U.S.C. § 551), and the agreement between NDB and UDIA to form DMI . . . does not describe the organization, procedure, or practice requirements of an agency.

(Rec. at 736). While this may be an accurate statement of those portions of the agreement relating to DMI, the agreement also imposes obligations on the National Board which is an agency.

The December 1994 agreement between the National Board and DMI formalizing the new staffing relationship includes provisions directly affecting the Board's organizational structure and internal operations. The agreement transferred duties from the National Board staff to DMI staff and altered the Board's prior procedures and practices in important areas such as collecting assessments, accounting, preparing financial and program reports, preparing proposed drafts of the Annual Business Plan and Annual Budget, and managing the implementation of approved programs.

Nonetheless, even if the agreements creating DMI are "rules," the agreements

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[31] A substantive rule creates a rule of law, "usually implement[ing] existing law, imposing general, extrastatutory obligations pursuant to authority properly delegated by Congress." *Southern California Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985) (citing *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984).

are within the exception to the notice and comment requirement provided for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice."[32] 5 U.S.C. § 553(b)(3)(A); *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993). This exception applies to "agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Batterson*, 648 F.2d at 707; *see also Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113, 1114 (9th Cir. 1974) (notice and comment not required for "technical regulation of the form of agency action and proceedings"). That a procedural rule also has a substantive impact does not trigger the notice and comment requirement. *Southern California Edison*, 770 F.2d at 783, *citing Rivera v. Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983).

The agreements creating DMI and shifting the National Board's staff functions to DMI relate to agency organization, procedure, and practices and were therefore not subject to the notice and comment requirement. There is no persuasive evidence in the record that the agreements affected the rights and interests of the parties. The plaintiffs must now communicate with the National Board first through the staff of a private organization, and that DMI now performs functions previously performed by National Board staff, is but a change in organization and procedure however distasteful to plaintiffs. *See, e.g.*, *Guardian Federal Sav. & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 665-66 (D.C. Cir. 1978). The assignment of staff duties to DMI, in the absence of a shift in policy-making responsibility, is not subject to the notice and comment requirement. *See Pickus*, 507 F.2d at 1114. Accordingly, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to the APA claim.[33]

E. FREEDOM OF INFORMATION ACT

Plaintiffs complain that DMI views itself as a private entity not subject to

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[32]The JO held that even if the creation of DMI were a rule, it fell within this exception. (Rec. at 736-37).

[33]Defendant invokes the public contact exception to the APA as an alternative ground. Notice and comment is not required in "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). However, the USDA has waived its right to rely on this exception as a matter of agency policy. 36 Fed. Reg. 13,804 (1971); *see also United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 682 n.15 (E.D. Cal. 1994), *citing Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 446 n.17 (9th Cir. 1993).

FOIA's disclosure requirements.[34] However, FOIA does not provide plaintiffs a private right of action to invalidate the agreements creating DMI. *See* 5 U.S.C. § 522. Plaintiffs concede that FOIA provides no independent right to the relief requested.[35] (*See* Pls.' Opp'n and Counter Mot. at 36:3-22). Accordingly, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to the FOIA claim.

F. CONFLICTS OF INTEREST

Similar to the alleged violation of FOIA, the claim that the creation of DMI was rife with conflicts of interest is presented primarily as further support for the need for notice and comment. It does not provide an independent ground for plaintiffs to invalidate the establishment of DMI. Although 18 U.S.C. § 208(a) makes it a crime for government employees to enter into government contracts in which they have a financial interest, and the government may disclaim any such contracts, no court has ever interpreted the statute to confer standing on third parties to challenge allegedly tainted government contracts. *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) (permitting government disaffirmance protects the public interest).

Similarly, plaintiffs present no legal argument in their papers to support the proposition that the provisions in the Order regarding a nominee's agreement to serve on the National Board provide a basis for a third party to set aside an agreement entered into by the National Board.[36] Even if National Board members

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[34]A FOIA request is currently pending before the USDA.

[35]Plaintiffs contend only that the important policies underlying FOIA should have been considered before the creation of DMI as part of the notice and comment process.

[36]A producer nominated to serve on the National Board is required to file, at the time of nomination, a written agreement with the Secretary of USDA agreeing to:

(a) Serve on the Board if appointed
(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and
(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) apples.

7 C.F.R. § 1150.134. The only remedy expressly provided in the Order for violation of § 1150.134 is a civil penalty of $1,000. 7 C.C.R. [so in original] § 1150.156(b).

Even assuming that § 1150.134 could provide a basis for invalidating the vote to establish DMI, its application would not have changed the outcome of the vote, which was 27 members in favor and 7 members opposed. Because the regulation does not define "relationship," the court defers to the National Board's interpretation of the term:

face what plaintiffs term "continuing conflicts of interest" as a result of their joint venture with UDIA, prohibition of such a situation is not addressed by any provision of the Order. Moreover, by regulation, National Board members must be milk producers drawn from different geographic regions; to this extent there is a potential conflict of interest in any decision that the National Board makes that could benefit producers in one part of the country more than others.

Defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether conflicts of interest require invalidation of the creation of DMI.

E. THE 5% LIMIT

Plaintiffs assert that the National Board violated 7 C.F.R. § 1150.151 by spending more than 5% of its projected assessment revenue for administrative expenses in 1995. Plaintiffs claim that DMI achieved compliance only by selectively categorizing core costs in the Annual Budget as program operations expenses instead of administrative expenses, a breakdown of core expenses that allegedly violates the April 1994 agreement creating DMI.

Plaintiffs mistakenly use the term "core costs" as defined in the April 1994 agreement interchangeably with "administrative expenses" subject to the 5% limitation. The definition of "core costs" includes "the basic cost of salaries and benefits for employees of [DMI] and general administrative costs for the operation of [DMI], and shall also include the costs of planning activities." (Rec. at 1254). The definition of this term, and the definition of "program costs" as excluding "core costs" in the April 1994 agreement, are immaterial for the purposes of calculating administrative expenses.

Substantial evidence supports the JO's conclusion that DMI did not violate the limit on administrative expenses. The JO observed that the figures stated in the 1995 National Board budget and the Board's July 1995 report to Congress disprove plaintiffs' claim. (Rec. at 719; *see also* Rec. at 692-93). Further the record contains evidence that the accounting practices used to calculate the 1995 budget was consistent with that used for previous budgets. (*See* Rec. at 1117-18). Accordingly, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is

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> A "relationship" exists whenever a member of the Dairy Promotion and Research Board is a board member or an employee, of an organization that operates a qualified State or Regional program or an organization which has a contractual relationship with the Board. Also, a "relationship" can exist if the Board member stands in a position to gain financially from the operations of such other organization.

(Rec. at 2421). Plaintiffs do not challenge the JO's factual finding that at most two members of the National Board were required to withdraw under this definition of relationship.

DENIED, as to whether DMI violated 7 C.F.R. § 1150.151.

IV. CONCLUSION

Defendant's motion for summary judgment is **GRANTED** as to all of plaintiffs' claims. Plaintiffs' cross-motion for summary judgment is **DENIED**. The clerk shall enter judgment for defendant.

IT IS SO ORDERED.
